

UMBC FINANCE BHD

DATO' SERI DR M MAHADEVAN MAHALINGAM

COURT OF APPEAL, PUTRAJAYA

ZALEHA ZAHARI JCA

[CIVIL APPEAL NO: W-02-805-04]

4 AUGUST 2008

This was the 7th defendant's appeal against the dismissal of its application to strike out the plaintiff's claim against it. The 7th defendant was a licensed finance company which claimed against the plaintiff as guarantor a sum of RM950,000 with interest. The plaintiff denied the guarantee alleging fraud by the defendants as a result of which he brought his claim against the defendants for damages and consequential orders.

Per Zaleha Zahari JCA delivering the judgment of the court:

(1) The 7th defendant's averment informing the plaintiff that he was a guarantor under the guarantee could not by itself be considered a misrepresentation. It was incumbent upon the plaintiff to state the matters allegedly made by the 7th defendant that induced the plaintiff to act to his detriment. (para 23)

(2) The plaintiff had failed to plead any material facts constituting a cause of action against the 7th defendant and had failed to plead any loss or prejudice caused by the acts of the 7th defendant. (para 24)

(3) The 7th defendant's denial of having enforced any letter of guarantee against the plaintiff and the 7th defendant's averment that the guarantee which had been challenged was not relied upon in the loan transaction between the borrower and the 7th defendant was material and conclusive. Also, by the settlement agreement between the 7th defendant and the

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2nd and 3rd defendants, the outstanding balance had been fully paid and the guarantee in issue was never referred to nor enforced by the 7th defendant. The allegations of fraud raised by the plaintiff in the statement of claim were, in essence, against the other defendants and not against the 7th defendant. It followed that the plaintiff's claim against the 7th defendant did not disclose a cause of action and was obviously unsustainable. Accordingly, it should be struck out. (paras 25, 26 & 27)

Bahasa Malaysia Translation Of Headnotes

Ini adalah rayuan defendan ke 7 terhadap penolakan pemohonannya untuk membatalkan tuntutan plaintif terhadapnya. Defendan ke 7 adalah sebuah syarikat kewangan berlesen dan telah menuntut sebanyak RM950,000 beserta dengan faedah dari plaintif selaku penjamin. Plaintif bagaimanapun menyangkal gerenti atas alasan fraud yang dilakukan oleh defendan-defendan dan berikutnya memfail tuntutan terhadap defendan-defendan untuk gantrugi dan perintah-perintah lanjutan.

Diputuskan (membenarkan rayuan)

Oleh Zaleha Zahari HMR menyampaikan penghakiman mahkamah:

- (1) Kenyataan defendan ke 7 memberitahu plaintif bahawa beliau adalah penjamin di bawah gerenti tidak boleh, atas semata-mata itu, dianggap sebagai suatu representasi salah. Adalah menjadi tanggungjawab plaintif untuk menyatakan perkara-perkara yang dikatakan dibuat oleh defendan ke 7 yang mendorongnya bertindak secara yang memudaratkan dirinya.
- (2) Plaintif gagal memplid apa-apa fakta material yang boleh menjadi kausa tindakan terhadap defendan ke 7 dan gagal memplid sebarang kerugian atau prejudis yang berbangkit dari perlakuan-perlakuan defendan ke 7.
- (3) Penyangkalan defendan ke 7 bahawa ia telah menguatkuasakan surat gerenti terhadap plaintif dan pengataannya bahawa transaksi pinjaman di antaranya dengan peminjam tidak bergantung kepada gerenti yang dicabar adalah material dan muktamad. Selain itu, berdasarkan perjanjian penyelesaian di antara defendan ke 7 dan defendan-defendan ke 2 dan ke 3, baki tertunggak telah pun dibayar sepenuhnya dan gerenti yang berkenaan tidak pernah berbangkit atau dikuatkuasakan oleh

- A defendan ke 7. Alegasi fraud yang dibangkitkan oleh plaintiff di dalam penyata tuntutananya secara intinya adalah terhadap defendan-defendan lain dan bukannya terhadap defendan ke 7. Ianya mengikut bahawa tuntutan plaintiff terhadap defendan ke 7 tidak mendedahkan sebarang kausa tindakan dan jelas tidak boleh dipertahankan. Oleh itu ia harus dibatalkan.
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Case(s) referred to:

Bandar Builder Sdn Bhd & Ors v. United Malayan Banking Corporation Bhd [1993] 4 CLJ 7 SC (refd)

C **Legislation referred to:**

Rules of the High Court 1980, O. 15 r. 6(2)(a), O. 18 r. 19(a), (b), (c), O. 19 r. 19(1)

For the appellant/7th defendant - VS Vismanathan; M/s S Visma & Co

For the respondent/plaintiff - Datuk VK Lingam (VK Lashmi with him);

- D *M/s VK Lingam & Co*

[Appeal from High Court, Kuala Lumpur; Civil Suit No: S3 (S2)-22-320-1993]

- E *Reported by Usha Thiagarajah*

JUDGMENT

F **Zaleha Zahari JCA:**

[1] On 28 August 2006 we allowed Maybank Finance Berhad's (the 7th defendant and appellant before us) appeal with costs. Our reasons are as follows.

- G [2] The 7th defendant is a licensed finance company. On 24 February 1993 the 7th defendant *vide* encl. (24) applied to strike out the plaintiff's statement of claim against them pursuant to O. 18 r. 19 Rules of the High Court 1980 ("the Rules") and/or under the inherent jurisdiction of the court. Alternatively, for an order that the 7th defendant cease to be a party to the suit pursuant to O. 15 r. 6(2)(a) and/or under the inherent jurisdiction of the court. This application was subsequently amended by consent pursuant to court order dated 8 October 2001. By amended summons-in-chambers filed on 8 October 2001, the 7th defendant sought to strike out the statement of claim and the suit against them pursuant to O. 18 r. 19(a) or (b) or (c) of the Rules and/or the inherent jurisdiction of the court.
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[3] The issue for determination in an appeal such as this is whether the pleadings as against the 7th defendant discloses a reasonable cause of action and whether there were issues to be tried. It is therefore necessary to set out the pleadings implicating the 7th defendant in the statement of claim, the 7th defendant's defence, as well as the rival contentions held out in the affidavits filed in support of and in opposition to the striking out application.

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The Pleadings

(a) *The Statement Of Claim*

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[4] Paragraphs 1 to 6 of the statement of claim were formal paragraphs. Paragraphs 7 to 22 deal with allegations of misrepresentations and alleged wrong doings on the part of the 1st to 6th defendants and does not implicate the 7th defendant.

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[5] The averments against the 7th defendant are as contained in paras 6, 23, 24, 25, 26 and 28 of the statement of claim which may be summarized as follows: On or about February 1987 the plaintiff was informed by the 7th defendant of a guarantee executed by him for RM950,000 plus interest thereon at the rate of 15% per annum ("the guarantee") in favour of the 7th defendant in consideration of the 7th defendant making advances to Masuddin Sdn. Bhd. ("the borrower"). The plaintiff pleaded to being shocked upon being so informed. At a meeting held on 6 February 1987 at the office of the 7th defendant, (where the plaintiffs solicitors were also present) the plaintiff informed the 7th defendant that he had never acted as a guarantor for the borrower, nor had he executed any document to that effect. When a copy of a guarantee bearing his signature attested before the 5th defendant was produced and shown to him, the plaintiff then denied meeting the 5th defendant. The plaintiff maintained that he had not at any material time intended to act as a guarantor for the borrower in respect of any facility given to the borrower by the 7th defendant.

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[6] The plaintiff then alleged that the 2nd defendant had fraudulently obtained his signature on the guarantee in issue when he was asked to sign three set of documents. The plaintiff contended that when the 2nd defendant asked him to sign certain documents, which documents he did in fact sign, the 2nd defendant had represented to him that those documents were security documents given by the 1st defendant in his favour as averred to in paras 13, 15 and 17 of his statement of claim.

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A [7] In para 24, the plaintiff alleged that the 7th defendant was one of the defendants who had acted fraudulently and perpetrated a fraud on him and relied on the particulars in paras 7, 9 to 23 of the statement of claim to substantiate this allegation of fraud. He then in para 25 alleged that the 1st to 7th defendants had used the guarantee in issue and made the representations which they did fraudulently knowing them to be untrue in all material respects, or recklessly, not caring whether they were true or false. In para 26 the plaintiff also alleged that the 1st to 7th defendants were guilty of misrepresentation against him and relied on the particulars in paras 7, 9 to 24 of the statement of claim to substantiate this allegation.

D [8] Paragraph 27 does not implicate the 7th defendant. In para 28 the plaintiff alleged that the 7th defendant was in breach of their fiduciary duty to him and guilty of negligence. The plaintiff relied on paras 23 and 24 to substantiate the allegation of negligence against the 7th defendant. Paragraphs 29 and 30 refers to the 2nd defendant and does not implicate the 7th defendant.

E [9] The plaintiff then contended that he had suffered loss and damages. Prayer i) of the statement of claim does not implicate the 7th defendant. In prayer ii) the plaintiff claimed damages against all of the defendants (which would include the 7th defendant) as well as consequential orders.

F (b) *The 7th Defendant's Defence*

G [10] The defence of the 7th defendant as held out in the amended statement of defence dated 12 November 1992 were as follows. After responding to the formal paragraphs in paras 1 to 6, the 7th defendant met the paragraphs averred against them in the following terms. The 7th defendant denied para 23 of the statement of claim. In para 6 reference was made to a settlement agreement dated 15 November 1988 between the 7th defendant and the 2nd, 3rd, 4th defendants and one Pragasa Moorthy s/o Krishnasamy by which agreement the outstanding loan of the borrower had been settled without reference to the plaintiff as guarantor. In para 7 of the amended defence the 7th defendant denied any knowledge of the representations alleged in para 24 and the particulars referred to, and also strenuously denied having acted fraudulently against the plaintiff, and required strict proof thereof. As for the allegations in paras 25, 26, and 28 of the statement of claim, in so far as it implicated the 7th defendant, the 7th defendant required the plaintiff to strictly prove the same.

(c) *The Striking Out Application*

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[11] The grounds as disclosed in the affidavit filed in support of the 7th defendant's striking out application, may be summarized thus:

[12] Around 13 March 1985, the 7th defendant had extended banking facilities in the sum of RM1,600,000 in favour of the borrower against two properties charged in favour of the 7th defendant by Syarikat SJS Development Sdn. Bhd. (SJS). These two properties were firstly, E.M.R 2605, Lot No. 224 Mukim Cheras, Daerah Ulu Langat ("the Cheras Property") charged by the borrower, and secondly, C.T 6965, Lot No. 1167, Mukim Pasir Panjang, Daerah Port Dickson ("the Port Dickson Property") charged by SJS.

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[13] On 9 March 1985, the 2nd, 3rd and 4th defendants and one Pragasa Moorthi (Pragasan) had executed a letter of guarantee. Another letter of guarantee was executed by SJS in favour of the 7th defendant on the same day.

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[14] The 7th defendant averred that by settlement agreement executed between the 7th defendant of the one part, and the 2nd, 3rd defendants and Pragasan of the other part dated 15 November 1988, the full outstanding debt owed by the borrower to the 7th defendant had been fully settled without reference to the plaintiff as guarantor under the guarantee dated 5 November 1995.

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[15] The 7th defendant also averred to having commenced foreclosure proceedings on 15 October 1989 in respect of the Cheras Property, following which a sum of RM893,242.30 was credited into the borrower's account. The 2nd defendant had paid a sum of RM700,000 to the 7th defendant towards the monies advanced by the 7th defendant to the said borrower. Arising from this payment and the amount realized by the foreclosure action, there was an excess sum of RM86,901.87. Although the 7th defendant had endeavoured to settle the said excess sum of RM86,901.87 to the borrower, the borrower has not claimed the said sum. The 7th defendant has since placed the said sum of RM86,901.87 in a suspense account.

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[16] The plaintiff in opposing the striking-out application averred that the 7th defendant had acted fraudulently and perpetrated a fraud on him and had used the guarantee dated 5 November 1995 for their own benefit without his prior knowledge and

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A consent despite having notice that the said guarantee was fraudulent, or recklessly, not caring whether they were true or false.

B [17] The plaintiff then set out his version leading to the execution of the guarantee dated 5 November 1995 which is as disclosed in the statement of claim. On or about September 1985, the 1st defendant had approached him and requested that his landed properties at Kenny Hill in Kuala Lumpur and at Sungai Petani (the landed properties), be used as collateral securities for the purpose of obtaining a temporary banking facility to accommodate the 1st defendant's ongoing business venture. Notwithstanding the 1st defendant's persistent request, the plaintiff averred that he refused to provide the collateral securities requested by the 1st defendant.

D [18] Subsequently, the 1st defendant persuaded the plaintiff to meet the 2nd defendant, together with his solicitors. Certain representations were made to the plaintiff inducing him to provide the landed properties as collateral securities for banking facilities provided to the 1st defendant. Believing the representations made to him to be true, he then signed various documents. According to the representations made to him by the 2nd defendant, he believed that the documents which he signed were transfers and assignments of the 1st defendant's properties in his favour, in return for making available to the 1st defendant a loan facility with MBF Finance Berhad. In addition, upon the 2nd defendant's request, the plaintiff averred that he had also pledged his fixed deposit receipts amounting to RM570,000 to secure the loan of RM513,000. Thereafter, the 2nd defendant further represented to him that there were further sets of security documents, including a promissory note by the 1st defendant. In the belief that the said representations made to him to be true and these documents would further secure his position with regard to the loan in question, the plaintiff stated that he signed the 2nd set of documents.

H [19] The plaintiff further averred that he was further induced to make out a cheque for the sum of RM510,415 in favour of the 1st defendant consequent upon the representations and assurances given by the 2nd defendant. Thereafter, at another meeting with the 2nd defendant, he was asked to execute a 3rd set of

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documents, which, according to the representations made to him, were additional securities executed by the 1st defendant in his favour.

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The Judge's Findings

[20] As the plaintiff had denied knowledge of the guarantee in favour of the 7th defendant, and the 7th defendant conceding that a loan facility did in fact exist, the judge was of the view that there was a *prima facie* cause of action against the 7th defendant. By reason of the allegations in the pleadings being "detailed and specific" he was of the view they cannot summarily be brushed aside. The judge's finding was that the 7th defendant was a proper and necessary party in the action, and that the plaintiff had a genuine and valid cause of action against the 7th defendant. To strike out the action against the 7th defendant at this stage would, according to the judge, cause irreparable harm and a grave injustice to the plaintiff as it would deprive him of a genuine legal remedy against the 7th defendant.

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[21] In the circumstances of this case the judge concluded that it was not possible to decide whether the plaintiff's claim will succeed or fail without hearing *viva voce* evidence in respect of the claim against the 7th defendant.

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Decision

[22] The principles of law applicable to an application for striking out are well settled, that it is only in plain and obvious cases that recourse should be made to the summary process under O. 19 r. 19(1) of the Rules. An applicant who asks that a writ of summons and statement of claim be struck out must show that the action is, on the face of it, obviously unsustainable. The court must be satisfied that there is no reasonable cause of action or that the claim is frivolous, vexatious or may prejudice, embarrass or delay the fair trial of the action. If the writ of summons and pleadings show on the face of it a cause of action, the fact that the plaintiff may be faced with grave difficulties of proof is not a ground for striking out the writ (See *Bandar Builder Sdn. Bhd. & Ors v. United Malayan Banking Corporation Bhd.* [1993] 4 CLJ 7).

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[23] We are of the view that the judge had erred in reversing the senior assistant registrar's decision and in dismissing the 7th defendant's application to strike out for the following reasons. Firstly, the averment of the 7th defendant informing the plaintiff

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A that he was a guarantor under the guarantee 5 November 1995 cannot by itself be considered a misrepresentation. It was incumbent upon the plaintiff to state the matters allegedly made by the 7th defendant which induced the plaintiff to act to his detriment.

B [24] As to the fraud allegedly committed by the 7th defendant against the plaintiff, note is taken of the fact that paras 7 to 22 do not implicate the 7th defendant. Paragraph 23 merely refers to the 7th defendant informing the plaintiff that he was a guarantor under the guarantee. Paragraph 24 does not state in what way the guarantee jeopardized the plaintiff's position by making use of the said guarantee. In our view the plaintiff has failed to plead any material facts constituting a cause of action against the 7th defendant and had failed to plead any loss or prejudice caused by the acts of the 7th defendant.

E [25] We are of the view the 7th defendant's denial of having enforced any letter of guarantee against the plaintiff and the 7th defendant's averment that the guarantee which has been challenged was not relied upon in the loan transaction between the borrower and the 7th defendant was material and conclusive. We note that by the settlement agreement between the 7th defendant and the 2nd and 3rd defendants, the outstanding balance had been fully paid and the guarantee in issue was never referred to nor enforced by the 7th defendant. We note that the allegations of fraud raised by the plaintiff in the statement of claim, were in essence, against the other defendants cited in the action and not against the 7th defendant.

G [26] Applying the established principles governing an application to strike out under O. 18 r. 19(a), on the facts and circumstance of this case, we are of the view that the matters contained in the statement of claim as against the 7th defendant does not disclose a cause of action against the 7th defendant and that the plaintiff's claim as against the 7th defendant was obviously unsustainable.

H [27] For the reasons abovementioned the 7th defendant's appeal was allowed with costs here and below. The plaintiff's claim as against the 7th defendant is accordingly struck out. The deposit to the appellant to the account of taxed costs.

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